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Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ISRAEL WEINSTOCK,

Petitioner,

v.

ESTHER WEINSTOCK,

Respondent.

On Petition for Writ of Certiorari to the Appellate Division, Second Department, State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Appellate Division, Second Department, imposed sanctions on petitioner for seeking modification of that portion of a prior decision holding that a separation agreement was the product of duress and overreaching to the extent of clearing the imputation of wrongdoing only, based on newly discovered evidence of perjury on the part of the respondent. The Appellate Division held that the appeal was frivolous in that it failed to seek some real form of relief and imposed the maximum sanction permitted by law based on the supposed waste of judicial resources. In doing so, the Court violated the right to petition under the First Amendment.

2. The New York court imposed the maximum sanction permitted under state law in an amount grossly disproportionate to the alleged offense, in violation of due process under the Fifth and Fourteenth Amendments.

3. The imposition of the maximum sanction, without proportion to the offense charged, was an excessive fine in violation of the Eighth Amendment.

4. The New York court failed to comply with the portion of the New York sanctions rule that requires a statement of the reasons why the sanction imposed was appropriate, and failed to comply with the minimum standards of due process required under the Fifth and Fourteenth Amendments.

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The Order of the New York Supreme Court, Queens County, dated March 26, 1997, is reproduced in Appendix B.

JURISDICTION

(1) The date of the Order of the Court of Appeals denying leave to appeal is December 22, 1998. (Appendix C).

(2) Jurisdiction is conferred under 28 U.S.C. § 1257(a) on the grounds that the order sought to be reviewed is repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND COURT RULES

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed.

Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Part 130-1.1 of the New York Rules of Court (22 N.Y.C.R.R. 130.1.1):

[*Reproduced in Appendix D*]

Part 130-1.2 of the New York Rules of Court (22 N.Y.C.R.R. 130.1.2):

[*Reproduced in Appendix D*]

STATEMENT OF THE CASE

Petitioner is an attorney and businessman and was divorced from the respondent in 1995 after ten years of costly matrimonial litigation, most of which was caused by the fraudulent and grossly inflated claims advanced by respondent and her former attorney, Stanley Alter, concerning the circumstances surrounding the execution of the separation agreement between the parties. In 1990 the Appellate Division, Second Department set aside a separation agreement between the parties on the grounds that the agreement was the product of coercion and overreaching by the petitioner, and made new findings of facts that differed very greatly from those made by the trial court that actually tried the case. *Weinstock v. Weinstock*, 167 A.D.2d 397, 561 N.Y.S.2d 808 (2d Dept. 1990). Respondent, coached by her attorney, had asserted under oath that she was impaired by drug and alcohol abuse, had diminished capacity (even though she held a responsible and well-compensated job), that the petitioner denied respondent access to his financial records, and that she had no knowledge whatsoever of the petitioner's assets when she signed the separation agreement.

Four more years of litigation ensued, culminating in a month-long equitable distribution trial in 1994. The evidence at trial established that the claims made in the 1990 litigation to set aside the separation agreement were fraudulent, and that in many cases these claims had been entirely fabricated by the respondent and her attorney. Respondent denied any history of alcohol or drug abuse, admitted that she had worked as the bookkeeper in petitioner's office at the time that she had previously claimed to have been denied access to petitioner's financial records, and admitted that she had received large sums of money from petitioner that she had previously denied receiving. Petitioner also proved that the psychiatrist who testified to the respondent's supposed diminished capacity had been impaired by Alzheimer's disease at the time of the trial, that the respondent was not in fact under any psychiatric impairment, that the respondent had been represented by an attorney of her choice at the time that she executed the separation agreement, and that there was no coercion or duress.[1] These and other misrepresentations made by respondent and her counsel, with the evidence demonstrating their falsity, are set fort in the "Summary of Contradictions" in the Appendix. The trial court found that respondent had lied, severely criticized her attorneys and expert witnesses, found that the marital estate was less than one-fifth of the amount claimed by the respondent, and made a distributive award in an amount far less than that sought by the respondent. Respondent fired Mr. Alter shortly after the trial, apparently in dissatisfaction with the outcome and with his bills, which the trial court found to be grossly inflated. Respondent appealed the divorce

1. The original trial court in 1989 did not make these findings. These findings were made on appeal by the Appellate Division in 1990. Intermediate appellate courts in New York have the power to make new findings of fact.

judgment but later abandoned the appeal. The divorce has been finally determined and no further relief is sought with respect to the divorce itself.

The 1990 Appellate Division decision remains a matter of public record, even though the allegations of coercion and overreaching were disproven at the trial in 1994.[2] Plaintiff is an attorney with a substantial litigation practice. Since 1990 petitioner has been subjected to numerous *ad hominem* attacks by unscrupulous adversaries based on the 1990 Appellate Division decision. The continued existence of this decision as a matter of public record since 1990 has been an impediment to the petitioner's professional career and a stain on his name and character. Petitioner's adversaries have ready access to the damaging and untrue material set forth in the 1990 decision, especially with the widespread use of search technology such as Lexis and Westlaw.

After the conclusion of the matrimonial litigation, plaintiff made a motion under Section 5015(a)(3) of the New York Civil Practice Law and Rules to vacate that portion of the 1990 Appellate Division decision which found that the petitioner had engaged in coercion and overreaching on the grounds that these findings had been procured by fraud. Petitioner did not seek to overturn any of the financial aspects of the 1990 decision. The petitioner's motion papers stated explicitly that the purpose of the motion was to clear the imputation made against the petitioner's good name and reputation and that no relief was sought affecting the respondent. Respondent did not contest the petitioner's showing that the proceedings throughout the litigation had

2. New York Appellate Division decisions are published in the official reports and in the unofficial New York Supplement as a matter of course.

been tainted by her fraud and perjury and the misconduct of her former attorney. The trial court denied the motion, holding, among other things, that it lacked the authority to review the new findings of fact made by the Appellate Division in its 1990 decision.[3] Petitioner appealed to the Appellate Division, which found as follows:

> We find that the plaintiff's assertion that his intent was to clear his name in no way diminishes the fact that the appeal was meritless. We believe that merit must be judged with reference to whether a particular course of litigation is or is not designed to obtain some real form of relief as a remedy for some cognizable wrong. The appeal taken by the plaintiff was completely without merit under this standard, and, in the absence of any other concrete motivation, this appeal can only have been intended to harass the defendant . . . We therefore award the maximum authorized amount as a sanction for this conduct (*see* 22 NYCRR 130-1.1), calling to mind that frivolous litigation causes a substantial waste of judicial resources to the detriment of those litigants who come to the court with real grievances.

The maximum amount authorized by the New York sanctions rule is $10,000.

Petitioner paid the sanction and filed a motion for permission to appeal to the New York Court of Appeals. *See* the Appendix. The issues raised to the Court of Appeals were

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3. This was *not*, incidentally, an accurate statement of New York law.

(1) that the imposition of sanctions was unjustifiable given the uncontroverted factual showing that the 1990 decision had been procured by fraud and misconduct; (2) that the lack of standards and arbitrary imposition of the maximum amount of sanctions denied petitioner due process (inaccurately characterized in the motion as equal protection); and (3) that the amount of the sanction was an excessive penalty for the offense alleged. There were no independent grounds for the motion for permission to appeal on state law grounds, such as would preclude Supreme Court review.[4] That motion was denied without comment on December 22, 1998. *See* the Appendix.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

A good name is rather to be chosen than great riches.

Proverbs 22:1

The state court imposed the maximum sanction on the petitioner for presenting an admittedly meritorious application that sought relief in the form of clearing one's good name rather than monetary damages. The New York sanctions rule permits the imposition of sanctions even on a meritorious

4. This Court has held, specifically with respect to New York appeals, that a "plain statement" of independent state grounds is required to oust Supreme Court jurisdiction in a case involving Federal constitutional issues. *New York v. Class*, 475 U.S. 106 (1986).

application and, unlike Federal Rule 11, does not require that the sanction be proportional to the offense alleged. The state court held that the 'name-clearing' relief sought by the petitioner merited the imposition of the maximum amount of sanctions essentially because the relief sought was non-monetary. In doing so, the state court violated petitioners' right of petition under the First Amendment and his right to due process under the Fifth and Fourteenth Amendments.

The issues raised here are of considerable public importance because the state court has held that sanctions may be imposed for seeking relief that affects matters of principle, an issue that is likely to recur, especially in civil rights or public interest litigation. The issues here affect vital constitutional rights but are likely to otherwise escape constitutional review because sanctions are usually imposed in lower courts and rarely reach the higher appellate courts. Moreover, the relief sought by the petitioner was *not* merely hypothetical or symbolic. Petitioner sought the relief requested of the state court because the decision sought to be modified, which was admitted to have been the product of perjury and misconduct, has adversely affected his professional practice. The heightened scrutiny given to the lax treatment of perjury, due to recent political events, warrants issuance of a writ to determine whether the petitioner had a constitutional right to seek the relief sought in the state court.

II.

THE STATE COURT VIOLATED PETITIONER'S FIRST AMENDMENT RIGHT OF PETITION

The Appellate Division decision at issue did not address the merits of the petitioner's motion to vacate the offending portions of its prior 1990 decision. Instead, the Appellate Division held that the motion to clear the petitioner's name was sanctionable not because the application was without merit but because the 'name-clearing' relief was not a "real form of relief as a remedy for some cognizable wrong" and was consequently sanctionable *per se* for consuming the court's time with a claim seeking merely 'name-clearing' relief.

The New York sanctions rule permits the imposition of sanctions *either* for conduct that is without merit *or* for actions taken for delay or harassment. The New York courts have held that sanctions may be imposed even on a meritorious application if the Court finds that the application was made for the purposes of delay or harassment. *Gordon v. Marrone*, 202 A.D.2d 104, 616 N.Y.S.2d 98 (2d Dept. 1994). The court in *Gordon* held that the imposition of sanctions on a meritorious application does not infringe on the First Amendment right of petition if the Court finds that the application was made for the purposes of harassment. The state court did not find that the application was without merit based on the facts and law, but rather that it was without merit because it sought 'name-clearing,' *i.e.*, non-monetary, relief. There is no bona fide issue that the application to the state court was colorable under the facts and law. The factual basis of the application was not disputed by the respondent, and the state court had the authority to grant the relief sought.

Oppenheimer v. Westcott, 47 N.Y.2d 595, 419 N.Y.S.2d 908, 393 N.E.2d 982 (1979); *McMahan v. City of New York*, 105 A.D.2d 101, 483 N.Y.S.2d 228 (1st Dept. 1984); *National Management Corp. v. Shelton Towers Associates*, 111 A.D.2d 154, 488 N.Y.S.2d 786 (2d Dept. 1985).

Petitioner's challenge to the constitutionality of the New York sanctions rule is based on its application to him. Petitioner's appeal to the Appellate Division stated expressly that petitioner was not seeking any relief that affected the respondent and that the purpose of the appeal was to clear his name, a clear distinction from *Gordon v. Marrone*, where the action taken was intended to harass the opposing party. The state court intentionally tried to bring this action within its rule in *Gordon v. Marrone, supra*, by holding that "in the absence of any other concrete motivation, this appeal can only have been intended to harass the [respondent]."[5] This holding was clearly pretextual. The real, and stated, purpose of the state court was to impose sanctions on the 'name-clearing' action not because of any injury to the respondent but because the 'name-clearing' appeal was a "waste of judicial resources to the detriment of those litigants who come to the Court with real grievances." In the absence of any intention to harass the respondent, the imposition of sanctions on the petitioner violated petitioner's First Amendment right of petition.

The courts have long recognized a right to bring actions seeking "symbolic" as opposed to monetary relief, especially

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5. Lest there be any issue as to whether the state court intended to bring the action within the rule of *Gordon v. Marrone*, the same court cited *Gordon v. Marrone* in a separate interlocutory appeal in the same action. *Weinstock v. Weinstock*, __ A.D.2d __, 1998 N.Y. Slip Op. 4704, 672 N.Y.S.2d 772 (1998).

in cases involving matters of constitutional right. *Carey v. Piphus*, 453 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). In *Amato v. Saratoga Springs*, 1999 U.S. App. LEXIS 4123 (1999), the Second Circuit held specifically that a plaintiff had the right to bring an action seeking 'symbolic' damages of one dollar under 42 U.S.C. § 1983, notwithstanding any considerations of the cost to the court system of entertaining a case for 'symbolic' relief, and notwithstanding the arguments of the dissent (remarkably similar to those at issue here) that entertaining the action would be an undue burden on the court system. In the present case, petitioner is entitled to more than merely symbolic relief. The motion to the Court of Appeals sets forth the actual injury caused to the petitioner as the result of the denial of the relief, through the use of the 1990 decision as a basis for personal attacks against the petitioner as a practicing attorney.

This Court has the exclusive right of review in matters where the law as set forth by state courts of last resort is contrary to federal constitutional law under the *Rooker-Feldman* doctrine. *Rooker v. Fidelity Trust Co.*, 44 S. Ct. 149, 263 U.S. 413, 68 L. Ed. 2d 362 (1923); *Dist. Of Columbia Court of Appeals v. Feldman*, 103 S. Ct. 1303, 460 U.S. 462, 75 L. Ed. 2d 206. The issue was preserved for review in the motion for leave to appeal to the New York Court of Appeals, which argued that the imposition of sanctions was "unsupportable and unjustified" in light of the factual and legal merit of the application. Although the First Amendment was not cited by name, the constitutional implications of the application of the rule in *Gordon v. Marrone* was clearly before the Court of Appeals in light of the holding of the Appellate Division and of the prior decision of the Appellate Division citing *Gordon v. Marrone* by name, especially since the Court of Appeals had no jurisdiction to entertain an appeal

from the factual findings of the Appellate Division. There is no bona fide issue that the state court held as it did, due to its understanding of federal constitutional law pertaining to the right to petition as set forth in *Gordon v. Marrone*. This Court has held that, in the absence of any stated independent state law grounds, it will assume that the state court made its decision based on its understanding of federal constitutional law. *Michigan v. Long*, 463 U.S. 1032, 1043 (1983).[6] The issues here are ripe for determination, and the Court should grant the writ.

III.

THE STATE COURT'S ACTION VIOLATED DUE PROCESS

The state court's imposition of the maximum sanction permitted under state law, in an amount grossly disproportionate to the alleged offense, violates Petitioner's due process rights under the Fifth and Fourteenth Amendments (inaccurately characterized in Petitioner's Motion for Leave to Appeal to the New York Court of Appeals as equal protection rights).

It is well established that the due process clause of the Fifth and Fourteenth Amendments places a limitation upon the power of the States to prescribe penalties for violations of their laws, and that a penalty so severe and oppressive as to be wholly disproportionate to the offense and obviously

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6. In New York cases involving denials of leave to appeal, this Court has held that it will make its own determination as to the preservation of constitutional issues. *Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850, 99 L. Ed. 2d 1231 (1955).

unreasonable transcends such limitation. *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 67. The analogy to state action in the form of a sanctions statute is apt. (See Petitioner's Notice of Motion for Leave to Appeal to the New York Court of Appeals, and Affidavit in Support thereof, § 2(1)).

Petitioner argued to the New York Court of Appeals that the imposition of sanctions in the amount of $10,000 was unsupportable and unjustified in light of the factual and legal merit of Petitioner's motion to the trial court to vacate its prior order on the basis of fraud on the courts under New York CPLR 5015(a)(3), a motion that no state court had found meritless. The Appellate Division's conclusion that Petitioner's conduct in appealing the denial of his motion was "completely without merit" because the appeal was not designed to obtain "some real form of relief as a remedy for some cognizable wrong" and thus could only have been intended to "harass the defendant by needlessly forcing her to incur attorneys' fees" ignores Petitioner's assertion, discounted but not disbelieved by the state court, that he sought only to clear his name (a legitimate interest protected in our law, *inter alia*, by the tort of defamation). This conclusion further ignores the fact that Petitioner made this desire clear to the Appellate Division and to Defendant at the outset (as set forth in the affidavit of Michael Dikman, Esq. dated June 3, 1996 filed in support of Petitioner's CPLR 5015(a)(3) application, p. 15 of the Record on Appeal), thus obviating any requirement that Defendant defend the motion or the appeal of its denial. Petitioner submits that under these circumstances not only was the court's imposition of sanctions unjustified *per se*, but the imposition of the maximum sanction allowable was clearly disproportionate to the "offense" and obviously unreasonable such as to be

unconscionable under the test enunciated by this court in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams.* The sanctions statute has both punitive and deterrent objectives. It cannot meet either if the magnitude of the sanction is not related to the magnitude of the wrong. *Browning Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301.

Petitioner respectfully submits that application of the statute is unconstitutional where the sanctioning court fails to comply with the legislative mandate to enunciate the reasons why the sanctions imposed are appropriate (See Petitioner's Motion for Leave to Appeal to the New York Court of Appeals § 3(i); 22 NYCRR 130-1.2). This failure denies appellant due process of law in application of the statute in depriving him of property through state action which must be presumed capricious and arbitrary given the court's failure to provide the rationale for its action as legislatively mandated. (See Petitioner's Affidavit in Support of his Motion for Leave to Appeal to the New York Court of Appeals, § 51.)

The Court's failure to comply with that portion of the New York sanctions rule that requires of the sanctioning court a statement of the reasons why the sanctions imposed were appropriate (22 NYCRR 130-1.2) further denies appellant due process in application of the statute inasmuch as it strikes at the heart of the reviewing court's ability to properly review the sanctioning court's exercise of discretion under the applicable standard of "abuse of discretion" (22 NYCRR 130-1.1[a]; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384). It must be inferred that the legislature's inclusion of the requirement of a statement of reasons was intended to

mandate that the amount of sanctions in fact be "appropriate". (This requirement may be read into 22 NYCRR 130-1.1[a][2], although the point is not free from doubt. By analogy, this requirement is spelled out in Rule 11 of the Federal Rules of Civil Procedure). Without the required statement the appellate task of ensuring that a litigant's constitutional right to be free from arbitrary, whimsical or capricious state action, a right traced to the Magna Carta and the British Bill of Rights of 1692, is made difficult, if not impossible.

The Second Department's decision in *First Nationwide Bank, Inc. v. Felberman*, 239 A.D.2d 385, 657 N.Y.S.2d 431 (2d Dept. 1997) further illustrates why the court's failure to enunciate reasons supporting the amount of sanctions it imposes results in denial of Petitioner's constitutional rights. In that case a mortgagor and her attorney were sanctioned $500 and $2500 respectively for their conduct in prosecuting an appeal found to be frivolous under the New York statute because "completely without merit in law or fact" (22 NYCRR 130-1.1[c][1]) and "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]). The Court there failed to enunciate the reasons why it found these amounts appropriate, just as it had in the case it cites, *SRF Builders Capital Corp. v. Ventura*, 229 A.D.2d 431, 644 N.Y.S.2d. 813 (2d Dept. 1996), and just as it has done here. (In *SRF Builders Capital Corp. v. Ventura* the Appellate Division sanctioned a mortgagor and his attorney $2500 each for their conduct in prosecuting an appeal found to be frivolous under the New York statute in circumstances very similar to those in the *First Nationwide Bank, Inc. v. Felberman* case). Petitioner's motion for leave to appeal to the Court of Appeals also describes a series of frivolous actions carried out by a known frivolous litigant, David Fischer, which the same Appellate Division punished

with only a token sanction. The disparate treatment imposed on the petitioner, without explanation or rationale, does nothing to further the punitive and deterrent objectives of the statute. This apparent disparity of application of the statute is extensively argued in Petitioner's Affidavit in Support of his Motion for Leave to Appeal to the New York Court of Appeals at §§ 38, 39 and 51.

IV.

THE SANCTION IMPOSED WAS AN EXCESSIVE FINE IN VIOLATION OF THE EIGHTH AMENDMENT

The state court imposed the maximum sanction permitted by New York law on the petitioner, not because the respondent or any other person was injured by petitioner's conduct but simply because the state court felt that the 'name-clearing' relief sought by petitioner was essentially symbolic relief.[7] In doing so, the state court violated the Eighth Amendment prohibition on excessive fines.

There is a dearth of cases on the effect of the Eighth Amendment on court-imposed sanctions, most likely because federal Rule 11 requires that the sanction be proportional to the injury. The New York statute, by contrast, has no such limitation. This invites arbitrary treatment such as that suffered by the petitioner. In the present case, the Court imposed the maximum sanction without regard to the fact that there was no cognizable harm to the respondent. This

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7. The issue of the excessiveness of the fine was raised in the Court of Appeals and was preserved for this Court's review. *United States v. One Parcel of Real Property Described as Lot 41*, 128 F.3d 1386 (10th Cir. 1997).

action was a grossly excessive fine in relation to the state's legitimate interests and violated the Eighth Amendment prohibition against excessive fines.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), this Court held that the Eighth Amendment prohibition against excessive fines was not limited to criminal penalties but also extended to civil actions, in that case punitive damages. This Court held in *BMW* that punitive damages that are "grossly excessive in relation to the State's legitimate interests in punishing unlawful conduct" violate the Eighth Amendment prohibition against excessive fines. This Court has also held that the Eighth Amendment prohibition against excessive fines applies to civil forfeitures. *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). This reasoning certainly applies with greater force to the imposition of sanctions by a Court, which is self-evidently a fine imposed by the state.

The sanction at issue here was grossly disproportionate to the supposed offense and was *intended* to be so by the state court. The sanction was intended to be purely punitive. No attempt was even made to justify the sanction in terms of the harm allegedly caused to the respondent; in fact, a separate sanction of $3,000 was imposed supposedly to compensate the respondent for the attorneys' fees incurred by her on the appeal (which were in fact far less than $3,000). The sole purpose of the $10,000 sanction, *as expressly stated by the state court*, was to punish the petitioner for bringing an appeal seeking 'name-clearing' relief simply because the state court felt that the 'name-clearing' relief was a form of 'symbolic' relief, and because the state court *chose* not to entertain that

application. The stated purpose of the state court was to impose the maximum sanction, not with regard to the gravity of the supposed offense but simply to punish the petitioner for bringing an application which had legal and factual merit but which the state court did not want to entertain.

The amount of the sanction by itself is not the issue, although a $10,000 sanction merely because the court chose not to entertain the appeal is in itself unduly harsh. The issue of constitutional importance is the imposition of the maximum sanction without any proportion to the alleged offense. It is merely fortuitous that the maximum sanction was $10,000; presumably the state court would have imposed a greater sanction if it had the power to do so. This Court should grant the writ to determine whether the state court's action violated the Eighth Amendment prohibition against excessive fines.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari, together with such further and different relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED SEPTEMBER 28, 1998

Israel **WEINSTOCK**, Appellant,

v.

Esther **WEINSTOCK**, Respondent.

Supreme Court, Appellate Division,
Second Department.
Sept. 28, 1998.

* * *

Before BRACKEN, J.P., COPERTINO, PIZZUTO and ALTMAN, JJ.

MEMORANDUM BY THE COURT.

In an appeal by the plaintiff from an order of the Supreme Court, Queens County (Golar, J.), dated March 26, 1997, which was determined by decision and order of this court dated May 11, 1998, the plaintiff, an attorney, and counsel for the respondent were directed to show cause why an order should not be made and entered imposing such sanctions and costs, if any, against the plaintiff, pursuant to 22 NYCRR 130-1.1(c), as this court might deem appropriate.

On the court's own motion and on the papers filed in opposition or relation thereto, it is

ORDERED that within 20 days after service upon him of a copy of this decision and order with notice of entry, the plaintiff Israel **Weinstock** is directed (1) to personally pay costs in the amount of $3,000 to counsel for the defendant Esther **Weinstock**, and (2) to personally pay a sanction in the amount of $10,000 to the Lawyers' Fund for Client Protection established pursuant to State Finance Law § 97-t; and it is further,

ORDERED that the Clerk of the Supreme Court, Queens County, shall enter judgment accordingly (*see,* 22 NYCRR 130-1.2).

The plaintiff, who is an attorney representing himself, pursued an appeal which was "completely without merit" (22 NYCRR 130-1.1[c][1]). We find that the plaintiff's assertion that his intent was to clear his name in no way diminishes the fact that the appeal was meritless. We believe that merit must be judged with reference to whether a particular course of litigation is or is not designed to obtain some real form of relief as a remedy for some cognizable wrong. The appeal taken by the plaintiff was completely without merit under this standard, and, in the absence of any other concrete motivation, this appeal can only have been intended to harass the defendant within the meaning of 22 NYCRR 130-1.1(c)(2), by needlessly forcing her to incur attorney's fees.

We therefore award the maximum authorized amount as a sanction for this conduct (*see,* 22 NYCRR 130-1.1), calling to mind that frivolous litigation causes a substantial waste of judicial resources to the detriment of those litigants who come to the court with real grievances. We also award costs in the

sum of $3,000 in light of the proof as to the attorney's fees incurred by the defendant in opposing the appeal, payable to her counsel.

APPENDIX B — ORDER OF THE NEW YORK SUPREME COURT, QUEENS COUNTY DATED MARCH 26, 1997

Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: Honorable SIMEON GOLAR IA PART 24
Justice

Index Number 15982 1983

Motion Date December 2, 1996

* * *

ISRAEL WEINSTOCK

– against –

ESTHER WEINSTOCK

The following papers numbered 1 to 11 read on this motion by plaintiff, to vacate an order of this court (Modugno, J.H.O.) dated March 27, 1989.

	Papers Numbered
Notice of Motion – Affidavits – Exhibits	1 – 7
Answering Affidavits – Exhibits –.....	8 – 10
Reply Affidavits	11

Appendix B

Upon the foregoing papers it is ordered that the motion is denied.

In the March 27, 1989 order that plaintiff now seeks to vacate, the court (Modugno, J.H.O.) set aside the parties' separation agreement, denied plaintiff's application for a conversion divorce based on that agreement and dismissed the cause of action for that relief. That order was affirmed by the Appellate Division, Second Department, by decision and order dated November 13, 1990. (*Weinstock v Weinstock*, 167 AD2d 394.) Thereafter, proceedings continued on defendant's counterclaim for divorce and equitable distribution. A trial on the issues of equitable distribution and maintenance began before this court in January 1993 and was concluded in May 1994. The final judgment of divorce entered herein is dated April 20, 1995. The instant application was initially made on July 24, 1996.

Plaintiff bases this motion pursuant to CPLR 5015 on a claim that newly-discovered evidence reveals fraud on the part of defendant and her attorneys. The "newly-discovered" evidence relied upon includes an April 1982 letter from defendant to plaintiff, an October 25, 1990 grievance committee complaint which plaintiff was aware of no later than April 1991, and, primarily, testimony by defendant at the trial of this matter on the issues of equitable distribution and maintenance in 1993-1994. None of these categories suffice as newly-discovered evidence entitling plaintiff to relief pursuant to CPLR 5015(a)(2). To be considered newly-discovered evidence under CPLR 5015(a)(2), the matter must have been unavailable to the moving party at the time of trial and not discoverable in time to move for a new trial (CPLR

4404), but must have existed at the time the court rendered the order or judgment which is the subject of the motion. (*See*, *Structural Concrete Corp. v George Campbell Assocs. Corp.*, 224 AD2d 516; 5 Weinstein-Korn-Miller, NY Civ Prac para 5015.07.) In this case, the 1982 letter was available to plaintiff during the 1988-1989 trial of his action for a conversion divorce while the complaint and trial testimony were not yet in existence.

To the extent plaintiff relies on the provision of CPLR 5015(a)(3) allowing relief from an order upon the ground of fraud of an adverse party, the application is still deficient. Although no specific time period for making such a motion is set forth in CPLR 5015(a)(3), the court will only grant relief from a judgment or order within a reasonable time. (*See*, 5 Weinstein-Korn-Miller, NY Civ Prac para 5015.16.) The time lapse between the 1989 order of J.H.O. Modugno and this 1996 motion is clearly unreasonable. Even accepting plaintiff's contention that the purported fraud was not evidenced until defendant's testimony before this court in 1993-1994, no excuse has been given for the unreasonable delay of more than two years between the conclusion of the equitable distribution trial in May 1994 and the making of this motion in July 1996. Thus, plaintiff failed to make this motion within a reasonable time and the relief sought is precluded.

Moreover, even if the court were to reach the merits of plaintiff's application, the motion would be denied. Plaintiff has not set forth any evidence sufficient to demonstrate that the decision of J.H.O. Modugno was procured by fraud on the part of defendant. (*See*, *Greater New York Sav. Bank v.*

Feder, 224 AD2d 661; *Abacus Real Estate Finance Co. v. P.A.R. Constr. and Maintenance Corp.*, 128 AD2d 821.) Furthermore, plaintiff's attempt to reargue the entire protracted litigation history between the parties and to catalogue all of his complaints regarding defendant's prior attorneys under the guise of this motion is inappropriate. In addition, the overwhelming thrust of plaintiff's argument is addressed to the Appellate Division's affirmance of J.H.O. Modugno's order, centering on the assertions that the Appellate Division improperly made new factual findings and was "duped" by defendant's attorney. Such contentions have no bearing on whether or not the decision of J.H.O. Modugno was based on fraud by defendant and, furthermore, are not within the purview of this court to review.

Dated: MAR 26 1997

s/ Simeon Golar
HON. SIMEON GOLAR J.S.C.

APPENDIX C — ORDER OF THE COURT OF APPEALS FOR THE STATE OF NEW YORK DENYING MOTION FOR LEAVE TO APPEAL DATED DECEMBER 22, 1998

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second ***day of*** December 1998

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2 Mo. No. 1352

Israel Weinstock,

Appellant,

v.

Esther Weinstock,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX D — RELEVANT RULE

22 N.Y.C.R.R. § 130-1

§ 130-1.1 Costs; Sanctions

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7, 8 or 10 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Appendix D

§ 130-1.1-a Signing of Papers

(a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

(b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1.

§ 130-1.2 Order Awarding Costs or Imposing Sanctions

The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of sanctions or both shall be entered as a judgment of the court. In no event shall the amount of sanctions imposed exceed $10,000 for any single occurrence of frivolous conduct.

Appendix D

§ 130-1.3 Payment of Sanctions

Payments of sanctions by an attorney shall be deposited with the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law. Payments of sanctions by a party who is not an attorney shall be deposited with the clerk of the court for transmittal to the Commissioner of Taxation and Finance.

§ 130-1.4 Application to Officers Other Than Judges of the Courts of the Unified Court System

The powers of a court set forth in this Part shall apply to judges of the Housing Part of the New York City Civil Court and to hearing examiners appointed pursuant to section 439 of the Family Court Act, except that the powers of Family Court hearing examiners shall be limited to a determination that a party or attorney has engaged in frivolous conduct, which shall be subject to confirmation by a judge of the Family Court who may impose any costs or sanctions authorized by this Part.

§ 130-1.5 Exception

This rule shall not apply to requests for costs or attorneys' fees subject to the provisions of CPLR 8303-a.

* * * *

APPENDIX E — NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS DATED NOVEMBER 1, 1998

COURT OF APPEALS : STATE OF NEW YORK

Appellate Division,
Second Department
Case No. 97-04292

ISRAEL WEINSTOCK,

Plaintiff-Movant,

–against–

ESTHER WEINSTOCK,

Defendant-Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

SIRS:

PLEASE TAKE NOTICE, that upon the within Affidavit of Israel Weinstock, Esq., dated November 1, 1998, and the Exhibits thereto, Plaintiff-movant herein Israel Weinstock will move this Court, at Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 15th day of November, 1998, for permission to appeal to this Court from an Order of the Appellate Division, Second Department, entered September 28, 1998, which Order unjustifiably and unreasonably, and in a manner strikingly demonstrating the

glaring lack of standards in this area of the law, imposed the maximum allowable $10,000.00 in sanctions, and $3,000.00 in costs, on movant, an attorney and counselor at law, whose July 29, 1996 CPLR 5015 Motion, for which he was sanctioned, brought to light respondent's and her former attorneys' deliberate fraud on the Courts below, clearly justifying redress pursuant to CPLR 5015 (a) (3), which fraud only became evident in a 1994 Equitable Distribution trial, Judgment on which was entered in 1995.

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Nisonoff & Schwartz, LLP.
Attorneys for Movant
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(718) 318-1000

TO: Paul Siminovsky, Esq.
Attorney for Defendant-Respondent
Jacoby & Meyers
423 Fulton Street
Brooklyn, N.Y. 11201
(718) 858-1474

APPENDIX F — AFFIDAVIT IN SUPPORT OF LEAVE TO APPEAL DATED NOVEMBER 1, 1998

COURT OF APPEALS : STATE OF NEW YORK

Appellate Division
Second Department
Case No. 97-04292

ISRAEL WEINSTOCK,

Movant,

–against–

ESTHER WEINSTOCK,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO APPEAL

STATE OF NEW YORK)
ss . :
COUNTY OF QUEENS)

ISRAEL WEINSTOCK, an attorney duly admitted to the practice of law before the Courts of this State, hereby duly deposes and swears under the penalties of perjury:

1. I am the former plaintiff-appellant and movant herein. I respectfully submit this affidavit in support of the within motion pursuant to Rule 500.11 of this Court for leave to

appeal, Rule 500.11 (d) (1) (i), from the Appellate Division, Second Department's Decision and Order dated September 28, 1998 requiring movant to pay the maximum allowable $10,000.00 in sanctions to the Lawyers' Fund for Client Protection and $3,000.00 in costs to respondent's counsel. *See* Exhibit "A" hereto.

2. The Questions presented for Review by this Honorable Court, Rule 500.11 (d) (1) (ii), are:

(1) When respondent's prior attorneys constantly played "fast and loose with the Courts" in two successive trials, and two appeals to the Appellate Division herein, providing a clear basis[1] which both Courts below, in rejecting Movant's July 23, 1996 CPLR 5015 (a) (3) motion, the underlying application herein, failed to entertain, was the Appellate Division's imposition of the said $10,000.00 in sanctions and $3,000.00 in costs on movant clearly unsupportable and unjustified?, and

(2) Given the complete lack of standards encumbering this State's judiciary in the sanctions area[2], resulting in wholly arbitrary

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1. *See* "The Courts Have Inherent Power to Remedy Fraud", ¶¶ 45, *et seq.*, *infra*.

2. *See* "How Judges Can Enforce Civility By Punishing Frivolous Conduct", N.Y.L.J., August 25, 1998:

(Cont'd)

differentials between the $10,000.00 result herein; that in litigation carried on by Heller, Horowitz & Feit, P.C., who, as seen at ¶¶ 38 *et seq.*, *infra*, filed a minimal twenty-five (25) wholly frivolous appeals, none of which had the slightest merit, but were intended solely as dilatory blocks to the administration of justice, resulting in *total* sanctions by the Appellate Division of *solely $1,500.00*; and, *e.g.*, in such Appellate Division decisions such as *Liker v. Grossman*, 175 A.D.2d 911 (2nd Dept. 1991), in which the plaintiff, found, like movant herein (herein, completely erroneously), to have filed a wholly spurious appeal, was ordered to pay the defendant's counsel a total $9,243.00, and a total $757.00 to the Lawyers' Fund for Client Protection[3] did such complete lack of standards

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(Cont'd)

> "What is astounding about [*Valdez v. Cibulski*, 17 Misc.2d 49 (Supreme Court, Queens Co. 1998 [citing *Santegolo v. Goldman, Sachs & Co.*, 169 A.D.2d 692 (1st Dept. 1991)] is that it appears to be a rarity. *There are few other published decisions in New York sanctioning an attorney for a frivolous legal theory or the misrepresentation of the facts during a trial. The absence of guidance on this subject* suggests that the judiciary is sparingly using its discretionary power to sanction". (emphasis added).

3. Should there not be some correlation between the costs incurred by opposing counsel and the sanctions themselves? As seen at ¶ 21, *infra*, the Appellate Division sanctioned movant for solely one (1) appeal, flatly *conceding* that movant's first appeal herein, in 1989, was *fully meritorious*. The "substantial waste of judicial

(Cont'd)

and uniformity deny movant his Constitutional guaranty of Equal Protection of the Law?

3. The Procedural History affecting this Motion, Rule 500.11 (d) (1) (iii), consists of:

(i) The within Order of the Appellate Division (Exhibit "A" hereto), entered September 28, 1998, sanctioning movant a total $10,000.00, but violating 22 N.Y.C.R.R. § 130-1.2's requirement of a statement of "the reasons why the court found the conduct to be frivolous" and imposing $3,000.00 in costs, which Order was served upon movant by the Appellate Division on or about October 5, 1998;

(ii) Movant's July 20, 1996 motion pursuant to CPLR 5015, denied by the Supreme Court, Queens County (Golar, J.) March 26, 1997 (Exhibit "B" hereto); the March 26, 1997 said Supreme Court Order being affirmed by the Appellate Division May 11, 1998 (Exhibit "C" hereto).[4]

(Cont'd)

resources to the detriment of those litigants who come to the court with real grievances," stressed by the Court below, thus applies *twenty-five times more* to Heller Horowitz and Feit, P.C. than to movant. Nevertheless, the Appellate Division sanctioned that firm precisely *one-twenty-fifth of one-tenth* of what it imposed on movant herein. *See* ¶ 39, *infra*.

4. Movant's July 20, 1996 motion sought to vacate an Order of the Appellate Division entered November 13, 1990, which affirmed

(Cont'd)

4. This Court's Jurisdiction, Rule 500.11 (d) (1) (iv), CPLR § 5602 (a) (1) (i) is based on the Appellate Division's aforementioned September 28, 1998 Order, which finally determined this action, and is not appealable as of right.

A. *Public Importance Movant's Rule, 5015 (a) (3) Motion*

5. The public importance justifying this Court's grant of jurisdiction herein, Rule 500.11 (d) (1) (v), above and beyond the aforementioned total lack of standards afflicting the State's judiciary, is the miserable reputation of the State's matrimonial bar, which has received a "black eye" due to the widespread impression that the level of practice of this bar shakes the public's confidence in the very integrity of the State's Judicial System. The public must be reassured that abuses such as that occurring herein, in which, as will be seen below, preceding the Appellate Division's punitive imposition of maximum sanctions herein came the outrages perpetrated by respondent's former attorneys, Alter & Alter, P.C., who in 1990 persuaded the same Appellate Division to adopt an *entirely fictional* portrait of movant as a monstrous

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(Cont'd)

an Order of the Supreme Court, Queens County, entered March 28, 1989. That March 28, 1989 Order dismissed movant's cause of action for a conversion divorce, set aside the Separation Agreement duly executed by movant and respondent, restored to the calendar respondent's counterclaim for divorce, and ordered the completion of discovery and an equitable distribution trial. The Appellate Division's November 13, 1990 affirmance made new findings of fact, wholly unsupported by the trial record, of purported "coercion" of respondent by movant. These findings indelibly tarred movant's professional reputation. *See* ¶¶ 40, *et seq. infra.*

"Svengali", "coercing his 'compliant' wife of 'diminished capacity' ", who (according to these attorneys) never had *any* financial disclosure from movant, into executing a separation agreement supposing leaving her with the right to receive from movant solely $15,000.00 a year in maintenance, which right, moreover, was supposedly conditioned on respondent's being simultaneously employed and taking six college credits.[5] Precisely *none* of these calumnious charges ever having been found as a matter of fact by the Trial Court, the Appellate Division's acceptance of them intervened due solely to Alter & Alter's "gutter level" practice.

6. Subsequent to the Appellate Division's November 13, 1990 affirmance of the trial court (which had overturned the separation agreement *solely* due a perceived disproportion between movant's estate and the amount left respondent under the separation agreement) Alter & Alter, in the ensuing Equitable Distribution trial, operated a complete "U-Turn", in which respondent, "miraculously, found it *highly convenient* to "remember" making lists of the income and disbursements from movant's various business interests and *regularly assisting in the preparation of financial statements*, even recalling the specific details of business meetings going back to 1960, the year the marriage commenced. If such decisions, based on such obvious fraud, are allowed to stand unchallenged, public confidence that the State's courts will listen to the facts and apply the law, and maintain their decisions in line with reality, cannot but be seriously compromised.

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5. This entirely fictional portrait of movant, destroying his professional reputation, was codified for bench and bar in the Official Practice Commentary to N.Y. Dom. Rel. L. § 236. *See* ¶ 40, *infra*.

Appendix F

7. In order better to understand the Appellate Division's September 28, 1998 maximum sanctions order against movant, the following brief summary of the procedural history is highly illuminating: Neither I.A.S. Court below, in 1989 or 1994, found any wrongdoing whatsoever on movant's part, but the Appellate Division's 1990 affirmance did, in no less than eight (8) separate ways ("diminished capacity", "coercion", "confiscatory agreement"). Neither the trial judge, J.H.O. Modugno nor J.S.C. Simeon Golar found "coercion", but the Appellate Division, duped by respondent's former attorneys, did. Neither found overreaching, but the Appellate Division did. Neither found diminished capacity, but the Appellate Division did. Neither found lack of financial disclosure, but the Appellate Division expressed particularly strong condemnation of movant on this point (whereas, as will be seen below, Judge Golar in the 1993-1994 Equitable Distribution trial, to the *direct contrary*, found that respondent's contentions in this respect were "belied" *by her own testimony*). The first trial court quite legitimately *flatly rejected* the testimony of Dr. Norman J. Levy, an aged physician admittedly suffering from Alzheimer's Disease, who, (after his rehearsed, direct testimony) not only broke down completely on the witness stand, but who further — subsequent to the Appellate Division's 1990 affirmance — *surrendered his license to practice medicine*. But the Appellate Division found Dr. Levy's testimony "of particular significance"! The trial court did not question the fact that respondent had retained an experienced matrimonial attorney of her own choosing, but the Appellate Division not only failed to acknowledge that respondent conferred, on at least four (4) separate occasions with this said attorney, it failed to mention Richard J. Kurtz, Esq.'s presence at respondent's

side altogether! The two *trial* Courts viewing at first hand the witnesses' demeanor and assessing at first hand the primary evidentiary documents thus flatly *disagreed* with *each and every one* of the new "findings" on appeal set out in the Appellate Division's November 13, 1990 affirmance.

8. 22 N.Y.C.R.R. 130-1.1 (c) (1) and (2) provide:

"For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another".

9. Movant's July 20, 1996 motion was pursuant to CPLR 5015 (a). That section clearly provides:

"The court which rendered a judgment or order may relieve a party from it upon the ground of
* * *

(2) newly discovered evidence which, if introduced at the trial, would probably have produced a different result"; or

"(3) *fraud, misrepresentation or other misconduct of an adverse party*". (emphasis added).[6]

10. As will be seen at ¶¶ 45 *et seq. infra*, Courts place *particular stress* on the need to remedy fraud perpetrated not simply by "an adverse party", but by *counsel* for such adverse party.

11. Clearly if movant's CPLR 5015 (a) (2) and (3) motion possessed *the slightest* arguable merit, the $10,00.00 in sanctions and $3,000.00 in costs imposed on movant cannot possibly stand herein. Crucially in this regard, neither of the two Courts below addressed — in *any respect whatsoever* — the CPLR 5015 (a) (3) question of "fraud, misrepresentation or other misconduct of an adverse party" — here, moreover, *on the part of respondent's attorneys, Alter & Alter, P.C.* Movant respectfully submits that his CPLR 5015 (a) (3) motion, clearly demonstrating the aforesaid fraud to both of the Courts below, cannot in any sense be found so "completely without merit" as to merit the sanctions and costs that were imposed on him September 28, 1998.

12. Thus the I.A.S. Court, *see* Exhibit "B" hereto, appeared to determine, *inter alia*, that movant's overwhelming evidence of fraud on the Appellate Division in both 1985, *see* ¶ 24, *infra*, and 1989, *i.e.*, respondent's attorneys' clear "duping" of that Court, somehow failed to "set forth any evidence sufficient to determine that the [1989

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6. There continues to be a parallel remedy for such behavior at common law. *Prote Contracting Co. v. Bd. of Educ. of the City of New York*, 230 A.D.2d 32, 657 N.Y.S.2d 156 (1st Dept. 1997).

trial judgment] decision of J.H.O. Modugno was procured by fraud" Movant respectfully submits that this finding of the I.A.S. Court, while on the one hand reaching the arguable determination that such fraud failed to taint the trial, nevertheless *recognized* movant's overwhelming initial demonstration of the grievous fraud perpetrated by respondent's former attorneys on the Appellate Division.[7]

13. The I.A.S. Court's March 26, 1997 Order thus expressed the corner into which it had been placed by the Appellate Division. Unable to quarrel with what *Judge Golar himself* clearly determined (finding respondent's 1989 testimony fully "belied" by her 1993-1994 testimony) were unjustified factual findings made by the Appellate Division November 13, 1990, duped by Alter & Alter, Judge Golar simply stated that the legal import of Alter & Alter's said fraud was "not within the purview of this court to review".

14. The I.A.S. Court additionally found that movant had "unreasonably delay[ed]" making his motion "more than two years between the conclusion of the equitable distribution

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7. Stated the I.A.S. Court in this regard:

> "[T]he overwhelming thrust of plaintiff's argument is addressed to the Appellate Division's affirmance of J.H.O. Modugno's order, *centering on the assertions that the Appellate Division improperly made new factual findings and was 'duped' by defendant's attorney. Such contentions have no bearing on whether or not the decision of J.H.O. Modugno was based on fraud by defendant* and, furthermore, are not within the purview of this court to review". (emphasis added).

trial in May 1994 and the making of this motion in July 1996".[8] The Court in this respect failed entirely to take into account the fact that it was only as of July 1996 that respondent, having obtained several successive enlargements of her time to perfect her appeal, finally waived her rights to appeal the *April 20, 1995* Final Divorce Judgment herein. Had respondent ever perfected her appeal, on any of the numerous occasions afforded her, said Appeal would have brought the entire matter before the Appellate Division. Again, therefore, the two-year delay highlighted by the I.A.S. Court similarly provides *no basis whatsoever* for the Appellate Division's $13,000.00 in sanctions and costs.

15. The Appellate Division, in its May 11, 1998 Decision and Order on Motion herein, *also* relied principally on movant's two-year delay in filing the within motion. *See* Exhibit "B" hereto, at page 2.

16. The Appellate Division nevertheless further remarked: "In any event, the plaintiff's motion, for the most part, *reargued the same evidence that was before the court in 1989*". *Id.*; emphasis added. But as the I.A.S. Court clearly found, neither respondent's October 25, 1990 Grievance Committee Complaint, nor her radical "U-Turn" in her Equitable Distribution testimony — both of which conclusively *proved* the fraud perpetrated on the Appellate Division in 1985 and 1989 — were ever before the Appellate

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8. A two-year delay cannot as a matter of law be determined impermissible. *See McMahon v. City of New York*, 105 A.D.2d 101, 483 N.Y.S. 228 (1st Dept. 1984) ("The inherent power of the Court to correct a judgment obtained by fraud is *not limited to a one-year time period*").

Division in 1989. These two aforesaid items of evidence further buttress movant's demonstration of respondent's former attorneys' massive fraud on the Courts below, thus *underlining* the inappropriate nature of the $13,000.00 in costs and sanctions herein.

17. As stated above, both Courts below focused *solely* on three of the items of evidence advanced by movant in support of his CPLR 5015 (a) (2) application, finding two of said items (respondent's October 1990 Grievance Committee Complaint, which *radically contradicted* her testimony in the 1989 trial, then *sub judice* before the Appellate Division; and her 1993-1994 Equitable Distribution testimony, which the Equitable Distribution Court itself explicitly found "*belied*" her *entire theory of the case* presented to the Appellate Division in 1990) insufficiently qualified as "newly-discovered evidence".

18. The third item of evidence rejected by the Courts below was a letter written to movant by respondent April 22, 1982. In that letter respondent notably declared:

> "I . . . realize how much pain I caused you — following your thinking: It was never my intention for a second not to have the children be like their father. . . *I still admire + respect you* (even love you . . . *I was always proud of who you are and what you have accomplished. . . I was also proud of what you stood for, your mind* [and] *your warmth*. I just want you to know that *never* ever was my thinking that I didn't want the children to follow you. . . . *I was always proud of who you*

are and what you have accomplished" (emphasis added)

19. The letter nevertheless went on immediately to complain:

> "My reasons for challenging your authority stemmed from other motives . . . I had to yield on every issue since how was I to know what right was, what [the learning of the] Yeshiva was etc. etc., ***so I fought you.*** *I wish I could undo all the pain I have caused you and myself but I can't.*" (emphasis added)[9]

20. The Appellate Division, *see* Exhibit "C" hereto, at 2, found that this letter "clearly was not probative of the issue of fraud". The Court's conclusion in this respect simply lacks all basis. The letter was clearly probative of the fact that the portrait of respondent as "most of the time compliant and submissive" (and thus subject to movant's purported "coercion") perpetrated on the Appellate Division by respondent's former attorneys, was *absolutely false* (movant did not introduce the letter into evidence at the first trial, before J.H.O. Modugno, because respondent never made her

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9. Respondent's said declarations *flatly contradicted* the portrait of her, as purportedly "very effacing and very compliant, most of the time giving in yielding". This portrait appears in the Appellate Division's 1990 affirmance, which affirmance relied for the said portrait *solely and exclusively* on an aged, Alzheimer-ridden physician, who testified completely incoherently on the witness stand and, moreover, shortly after testifying (to events occurring eight years prior to the trial) surrendered his license to practice medicine.

"compliant and yielding" claim in that trial). At an absolute minimum, the letter thus further proves respondent's CPLR 5015 (a) (3) fraud.

21. The Appellate Division's September 28, 1998 order imposing the maximum allowable, $10,000.00 in sanctions and $3,000.00 in costs on movant, further *explicitly recognized* that movant's central purpose was "*to clear his name*".[10] The Court *nevertheless* determined movant's appeal "frivolous" based on the Court's *perceived inability to grant movant any relief*:

> "*We find that the plaintiff's assertion that his intent was to clear his name* in no way diminishes the fact that the appeal was meritless. *We believe that merit must be judged with reference to whether a particular course of litigation is or is not designed to obtain some real form of relief as a remedy for some cognizable wrong*. The appeal taken by the plaintiff was completely without merit under this standard, and, in the absence of any other concrete motivation, this appeal can only have been intended to harass the defendant within the meaning of 22 NYCRR 130-1.1(c)(2), by needlessly forcing her to incur attorneys' fees." (emphasis added).[11]

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10. From the shame imposed on movant by that Court's November 13, 1990 Decision herein. *See* ¶¶ 40, *et seq.*, *infra*.

11. Both parties' submissions respecting the Impostition of Sanctions are annexed as Exhibit "D" hereto. The Appellate Division's conclusion of its own lack of any remedy herein is flatly opposed to prevailing law. *See e.g.*, *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 419 N.Y.S.2d 908, 393 N.E.2d 982 (1979), cited at ¶ 46, *infra*.

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B. *Respondent's Former Attorneys' Fraud on the Courts Below*

22. The "scorched earth" policy of respondent and her attorneys was manifested in numerous and varied ways. Most striking was respondent's aforementioned October 25, 1990 Complaint to the Grievance Committee of the First Department (*i.e.*, *subsequent* to Oral Argument before the Appellate Division but *prior to* its November 1990 affirmance), a blatantly baseless and spiteful effort both to embarrass movant and, by its stated terms, to disbar him. This Complaint *flatly recanted* the story put forward by Alter & Alter, then *sub judice* before the Appellate Division, of movant's "coercion" of a "compliant and submissive" respondent. It is moreover apparent that in filing this Complaint movant had the aid of her attorneys, deliberately catering, yet again, to her destructive ends — how could it possibly have been in respondent's "best interests" for her to attempt to *deprive* movant of his livelihood in one forum, while seeking to *obtain its benefits* in another?

23. Respondent's attorneys, further, dragged the within proceedings out to *the maximum degree possible*. They first objected to the entry of an early Divorce Judgment, without prejudice to any financial claims, perpetuating the maintenance herein of a red herring not finally disposed of until Judge Golar's November 29, 1994 Memorandum at the conclusion of the Equitable Distribution trial herein (*see* Exhibit "E" hereto, at pages 1-2).

24. Additionally, respondent, in opposition to Orders of the I.A.S. Court (Glass, J.) dated June 20, 1985 and October

15, 1985 granting movant a protective order preventing further discovery pending that Court's determination of the validity of the Separation Agreement, and, thereafter, so as to induce the Appellate Division, *see Weinstock v. Weinstock*, 122 A.D.2d 790, 505 N.Y.S.2d 675 (1986), to overturn Justice Glass's said Orders, filed, *seriatim*:

(i) A sworn affidavit, dated April 17, 1985, stating that respondent had: "*no idea, nor have I ever been informed of my husband's income or financial holdings . . .* ";

(ii) A further sworn affidavit, dated August 16, 1985, stating that respondent "*believes* that [movant] *may have numerous business interests, including real estate, other than his law practice . . .* " (thus *clearly implying* that she had *no knowledge of said assets whatsoever* — and only "believed" in the assets' *potential* existence);

(iii) A further sworn affidavit of respondent's, dated March 28, 1989, in which she further spuriously claimed that she "*was never [movant's] bookkeeper, but, instead, an unpaid clerical worker . . .* "; and

(iv) Respondent's Appellant's Brief to the Appellate Division in 1985, in which her attorney Stephanie Alter, Esq., *flatly conceding*: "*[T]he validity of [the parties' January 17, 1983] agreement hinges [on the]*

financial disclosure" provided respondent by movant, further stated:

> "[*B*]*y its own terms, lacking financial disclosure, the agreement at issue is 'invalid and unenforceable.' Respondent has never revealed his income, assets or net worth to Appellant . . .*
>
> *Instead of providing the required disclosure, Respondent hopes, even at this late date, to conceal his financial worth so as to prevent both the Appellant from proving, and this Court from knowing, how unconscionable this agreement is. . . . Respondent attempts to portray Appellant as a bookkeeper . . . The fact is that her clerical duties included writing checks to pay office bills and entering deposits under the instruction of Respondent's accountant and long-time personal friend. . . .* "
> (emphasis added; Mrs. Alter's *highly misleading* citations to the record omitted)

25. The **absolute gall** demonstrated by these attorneys throughout this action could not be *better demonstrated* than through the sentence immediately following that just quoted above from their 1985 Brief to the Appellate Division, proffering a "Big Lie", *flatly contradicted by all of the testimony and documents in this action*:

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> ***"The only document seen by Appellant regarding Respondent's income was a tax form mailed to the marital home after the lawsuit was begun. Appellant managed to copy this before it was confiscated from her purse by Respondent"*** (*id.*; emphasis added).

26. Indeed, the words "absolute gall" are *woefully inadequate* to describe these attorney's conduct. At the early stages of this action, the attorneys, as seen, pushed respondent into accusing movant of having *stolen* the said income tax form. Despite this incendiary (and blatantly false) accusation, *in the very same affidavit*, the attorneys provided the Court with *a copy of the document which movant allegedly "stole"*.[12]

27. Respondent's attorneys thus having successfully duped the Appellate Division into overturning Judge Glass's

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12. This charge of "stealing" the form caused movant to stipulate to ceding to respondent the exclusive possession of the marital home, in that movant did not wish to be faced with further spurious and calumnious charges, to which the attorneys would undoubtedly cause respondent to stoop. From an individual who 'admired [movant's] character' and the principles for which movant stood, for a period of over twenty-two years, respondent had suddenly transformed herself (or been transformed by her attorneys?) into a person flatly accusing movant of being a thief. Once a person declaring her admiration for what movant stood for, respondent had become so bitter that she could make the absurd claim that she *saw only one document during the entire marriage*! The trial before Judge Golar revealed that this absurd "one document" claim was so absurd as to prevent the discovery of a term adequate to describe the attorneys' outrage on the Appellate Division.

1985 protective Orders, they thereupon embarked upon a cavalier rummaging through movant's files, lasting *up to the conclusion of the Equitable Distribution Trial at the end of 1994*! This practice revealed the true agendas of respondent and her attorneys herein (which agendas, unfortunately for respondent, have revealed themselves to be *mutually exclusive*): for respondent, her evident need to hurt and desire to ruin movant; for her two unified counsel, their evident desire to fuel the fire, and milk their victim to the maximum extent possible.

28. Thus, movant testified, without contradiction, at the Equitable Distribution Trial that he turned over to respondent's attorneys a minimum ***six transfiles of documents, statements and records***, including *the majority of the exhibits introduced by respondent's attorney at trial.* Despite said *full compliance* with respondent's discovery requests, these attorneys continually chanted, "Stonewalling". When required by the I.A.S. Court to list the specific items sought by them, these items turned out to relate to facts not in issue, to be readily available from other sources, or, indeed, to be already in respondent's possession. The attorneys thus hoped to achieve their results (vastly increased billing) through blatant *oppression* (intentionally disrupting movant's office): demanding *every tidbit* of information imaginable, despite the fact that such was *not needed* (as revealed in respondent's 1993-1994 Equitable Distribution testimony, she *knew literally everything about movant's finances*).

29. A further striking example of the attorneys' attitude, in this respect, was their reaction to movant's October 28, 1987 Notice to Admit, which Notice sought to relieve the

I.A.S. Court of the burden of ruling on numerous matters which should in all justice and equity have been settled at minimal expense and without serious dispute, principally (i) movant's continued payment of both respondent's and the children's living expenses subsequent to the January 17, 1983 agreement, (ii) movant's viewing and agreement to the 108-48 64th Road premises as her new residence; as well as (iii) respondent's assent to the proposition that her work as movant's bookkeeper furnished her with *detailed intelligence* of movant's assets and finances. Had the attorneys responded in professional fashion to said Notice to Admit, the I.A.S. Court could have avoided ***fully 90%*** of the trial time expended on this action.

30. Indeed, as was stated above, respondent, by the time of the 1993-1994 Equitable Distribution trial, suddenly found it ***highly convenient*** to "remember" making lists of the income and disbursements from movant's various business interests, ***regularly assisting in the preparation of financial statements***, even recalling the specific details of business meetings going back to 1960[13] (this from a woman, the Court should recall, who had sworn *on numerous occasions*; *see* ¶ 20, *supra*, that she had "**no idea, nor have I ever been informed of my husband's income or financial holdings . . . *believes* that [movant] *may* have numerous business interests, including real estate, other than his law practice . . . was never [movant's] bookkeeper, but, instead, an *unpaid clerical worker*" . . . The only document seen by**

13. Respondent remembered not only the year, but also the month (after June 1960). The reason for this suddenly pinpoint memory was, in point of fact, blatantly evident: She wanted this property to qualify, without contest, as ***part of the marital estate***!

respondent was a single tax form) Had respondent's attorneys admitted to the *true* facts in 1987, both Court and parties, quite evidently, could have been spared, without any exaggeration, the aforementioned 90% of the testimony and exhibits produced over the last eleven years of this action. Indeed, had their spurious tactics not intervened herein, the within Separation Agreement *would not have been overturned in the first place*!

31. As the Record below clearly demonstrates, Respondent's former counsel falsely led her, first, to believe that they could *hoodwink* the Equitable Distribution Court into believing that the amount of "marital assets" at issue were $7,000,000.00, instead of the actual $2,000,000.00 figure found by the Court below, based on *totally flawed* methods of valuation including, *inter alia*, *double counting*. (The Equitable Distribution Court arrived at a final, conclusive figure of precisely $1,500,000.00).

32. Additionally, Judge Golar's remarks rejecting the so-called "testimony" of respondents' "experts" reads, in pertinent part:

> "*The court does not credit the testimony of defendant-wife's CPA's whose expertise clearly was not in valuing real estate partnership interests, as there is little merit to their attempts at evaluation solely by capitalizing earnings without regard to factors such as lease expirations, vacancy rates and underlying property values. Instead, the court adopts the figures contained in Plaintiff*[-husband]*'s Exhibit*

46 computed as of December 31, 1993 which are based on anticipated sales prices . . "

33. The Alters' $7,000,000 figure proffered to respondent thus represented a near-500% inflation of the figure found by Judge Golar to represent reality. Similar tactics by these attorneys resulted, in *Katz v. Katz*, Supreme Court, Westchester County, with a J.H.O.'s award of 60% of the marital estate to the wife and 40% to the husband. Due to the Alters' fraudulent *inflation* of the marital estate the husband, finding his alleged "40%" *not to exist*, was required to file for Bankruptcy.

34. The Record below further clearly demonstrates that the Alters have engaged in *a constant pattern* of rapacious depredations of this State's Judicial System. In *Friedman v. Friedman*, Queens County Index No. 21259/89, the Alters attempted to foreclose on the residence of the wife's mother, who had signed a personal guarantee of the attorneys' fees. In a January 20, 1994 Memorandum Decision in the *Friedman* action, Judge Golar sternly condemned them:

"Despite the award of counsel fees to plaintiff's former attorneys, *the court does not sanction their conduct in attempting to collect those fees. While seeking a confession of judgment from plaintiff and requiring plaintiff's mother to guarantee plaintiff's payment of their fees did not constitute a violation of the rules of conduct for attorneys in matrimonial actions then in force, the current rules proscribing such conduct* (Uniform Civil Rules for the Supreme Court [22 NYCRR 202.16];

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> Disciplinary Rules of the Lawyers Code of Professional Conduct [22 NYCRR Parts 1200, 1400]) *are merely codifications of what has always been proper and ethically correct conduct. The Court hopes that the firm's future efforts at collection of outstanding fees attributable to the Family Court proceedings will be guided by these considerations and the Court's determination of the reasonable fees in this action*".

35. Judge Golar further reported in this respect: "[Responde]nt's original retainer agreement with her counsel in March 1985 was modified in January 1991 *to raise the billable hours for office time from $175.00 to $225.00 and for court time from $225.00 to $275.00*".

36. Thereafter, the attorneys spuriously prolonged the case *to the maximum extent possible*. Indeed, the Equitable Distribution Court found that, despite respondent's *series* of sworn affidavits describing her purported need of additional support for her "living expenses", the *entirety* of the *pendente lite* payments made by movant to respondent's account were, *instead*, generated to *feed respondent's attorneys' billings*. Indeed, the Alters billed an approximate total of $300,000.00; their purported "accountants," for their part, *attempted* to bill $50,000.00.

37. After the Equitable Distribution trial, the Court below not only *flatly rejected* (as seen) *in its entirety* respondents' "experts' " spurious "valuation" testimony; it further *dramatically reduced the attorneys' fee request, finding "inappropriate . . . the high billable hours for office*

time" and "the total fee . . . grossly enlarged in comparison to the results obtained, amounting to over 40 percent of the distributive reward". The Court further found that respondent "*has effectively paid $73,157.90 of which no mention is made in counsel's affirmation of legal services*".

C. *Striking Disparity With Fischer Counsel Sanctions*

38. Heller, Horowitz & Feit, P.C.'s ("HH&F") "scorched earth" technique in the I.A.S. Court and the Appellate Division, Second Department, between 1989 and 1998, resulted in a minimal twenty-five frivolous appeals wasting the precious time of the Courts of this State. Most recently, HH&F, on October 23, 1998, formally abandoned the last frivolous appeal filed by them below, notifying this firm only *after* subjecting this firm to a frivolous motion for stay pending appeal, formally denied by the Appellate Division October 15, 1998. *See* Exhibit "F" hereto.[14]

39. In five of the cases David Fischer, an individual determined by the I.A.S. Court as of April 1993 to give

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14. *See Fischer v. Deitsch*, 198 A.D.2d 327, 605 N.Y.S.2d 703 (1993); *Schusterman v. Fischer*, 198 A.D.2d 343, 605 N.Y.S.2d 871 (1993); *Schusterman v. Fischer*, 198 A.D.2d 343, 605 N.Y.S.2d 872 (1993); *Deitsch v. Fischer*, 198 A.D.2d 322, 605 N.Y.S.2d 873 (1993); *Deitsch v. Fischer*, 198 A.D.2d 322, 605 N.Y.S.2d 874 (1993); *Deitsch v. Fischer*, 198 A.D.2d 323, 605 N.Y.S.2d 875 (1993); *Deitsch v. Fischer*, 198 A.D.2d 324, 605 N.Y.S.2d 876 (1993); *Deitsch v. Fischer*, 198 A.D.2d 325, 605 N.Y.S.2d 877 (1993); *Deitsch v. Fischer*, 198 A.D.2d 326, 605 N.Y.S.2d 878 (1993) *Fischer v. Deitsch*, 168 A.D.2d 599, 563 N.Y.S.2d 836 (1990); *Sadov Realty Corp. v. Shipur H'Shechuna Corp. and David Fischer*, 84 N.Y.2d 923, 645 N.E.2d 1221.

testimony "totally devoid of verity and bordering on perjury", the I.A.S. Court (Yoswein, J.) itself sanctioned HH&F $1,500.00; the Appellate Division thereafter imposed on HH&F merely an additional $1,500.00 in sanctions, resulting in a total $3,000.00. It is respectfully submitted that $3,000.00 sanctions on counsel working for a client with a minimal $60,000,000.00 "war chest", who has wreaked *eight solid years* of havoc on this State's Judicial System, amounts, simply, to a .005% "tax" on his yearly operations. In the within case, in direct contrast, the Appellate Division has sanctioned an attorney at law whose only "crime", as the Appellate Division itself explicitly recognized, *see* Exhibit "C" hereto, has been to *attempt to clear his name* before the law courts of this State, wherein he practices his life's chosen profession, based upon a deliberate fraud on the I.A.S. Court that Respondent has *never chosen to deny* (and which fraud, moreover, is conclusively *established* by Justice Simeon Golar's July 29, 1994 Decision finding respondent's 1989 trial testimony herein "belie[d]" by her testimony before the Equitable Distribution Court).

D. *Nov. 13, 1990 Decision Blighted Movant's Reputation*

40. As suggested at the outset of this affidavit, the destructive impact upon movant's professional (and personal) existence of the Appellate Division's November 13, 1990 affirmance, publicly branding movant as a monstrous Svengali purportedly "coercing" his wife of twenty-two years into executing a purportedly "unconscionable" Separation Agreement, was underlined for both bench and bar by McKinney's Official Practice Commentary to N.Y. D.R.L. § 236 (Alan D. Sheinkman, Esq., 1992; Book 14, §§ 220 to

End, Cumulative Annual Pocket Part, at page 76). This text declared, for all the world to see, the Appellate Division's astonishing *acceptance* of respondent's *entire grab bag of scurrilous attacks upon movant's personal character*:

> "The unconscionability doctrine, discussed in the bound volume at pages 238 to 242, was applied to nullify a separation agreement in *Weinstock v. Weinstock*, 1990, 167 A.D.2d 394, 561 N.Y.2d 807, appeal dismissed 77 N.Y.2d 874, 568 N.Y.S.2d 916, 571 N.E.2d 86, reargument denied 77 N.Y. 2d 940, 569 N.Y.S.2d 614, 572 N.E.2d 55. There, the husband, an attorney, *had his wife of 22 years sign an agreement under which she waived all rights to seek equitable distribution* of his assets — assets which exceeded $2,000,000. In addition, *the agreement limited the wife to a less than substantial maintenance award*, which was conditioned on her simultaneously working and attending college. *The wife was required to transfer her share in the marital home to the husband and to give him a broad power of attorney to sign her name to papers required to give effect to the agreement. The wife was even induced to co-sign a loan, the proceeds of which were kept by the husband. The wife's psychiatrist testified that the husband was a controlling, dominant person and that the wife was very self-effacing and compliant. The psychiatrist testified further, that in his opinion, the wife was emotionally dependent upon the husband. Indeed, the wife had limited knowledge of financial matters.*

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> Based on all of these facts, the court held that the agreement was so manifestly unfair, and *the apparent product of coercion and overreaching on the husband's part*, that it was void *ab initio*" (emphasis added).

41. Can anyone reading the above-quoted text possibly comprehend that *it was respondent* who insisted upon the separation and divorce? Can anyone comprehend that respondent was *represented by an attorney of her choice*? Can anyone comprehend that her counsel advised her *against* executing the separation agreement, and that, moreover, *respondent insisted on executing the agreement DESPITE her counsel's advice*? Thus, can anyone possibly comprehend that, contrary to the Appellate Division's series of "findings" on November 13, 1990, respondent later admitted, in the course of the Equitable Distribution trial, that respondent admitted that she had *full knowledge* of movant's financial affairs — and indeed ***helped prepare movant's financial statements***? It is respectfully submitted that each of these questions must be answered in the negative, in that, in particular, respondent's Equitable Distribution testimony *sheds a totally different light, not only on movant's character, but on the entire separation agreement itself.* Under these circumstances, the Appellate Division's 1990 affirmance, herein demonstrated to have been based upon *a totally distorted and indeed fraudulent presentation to the Appellate Division*, cannot but be vacated.

42. Additionally, opposing counsel have on numerous occasions made use of the Appellate Division's November 13, 1990 affirmance for the launching of *ad hominem* attacks

on movant's personal character. Thus in the aforementioned *Walker v. Weinstock* action, a Brief filed by movant's adversaries in the Appellate Division included the following inflammatory charges:

> "*Nor does Weinstock quake at undertaking abusive litigation based on coercion. Weinstock's application for conversion divorce based on a separation agreement was denied by a judicial hearing officer and affirmed* [the Appellate Division stating:]
>
> > '[T]he agreement is so manifestly unfair, and the apparent product of coercion and overreaching on the part of the plaintiff, that it was properly set aside.'
>
> *Weinstock v. Weinstock*, 167 A.D.2d 394, 561 N.Y.2d at 808 (citations omitted). Thus, *evidence beyond the confines of the instant case shows that Weinstock carries through on threats to litigate meritless alleged libel claims, and that he does not hesitate to use coercion to obtain what he wants.*" (emphasis added)[15]

43. Similarly, in *Unger v. Unger*, New York County Supreme Court Index No. 405905/93, opposing counsel

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15. *See also* a May 24, 1996 affidavit in this same action, in which opposing counsel launched a similar calumny: "*Weinstock has already been found to have entered into an unconscionable, and therefore unenforceable, contract with another person who, like Walker, placed her trust in him*".

launched the following similar personal attack in an opposition affidavit submitted to the I.A.S. Court:

> "The Court is respectfully urged to refer to the case of *Israel Weinstock v. Esther Weinstock*, 167 A.D.2d 394, 561 N.Y.2d at 807 (2nd Dept. 1990) in order to better understand *why Weinstock has made this motion . . . Weinstock is simply repeating what he did to his own wife* — while representing the herein defendant." (emphasis added)[16]

44. Similarly, in *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, New York County Supreme Court Index No. 123288/94, a Respondents' Brief filed by my adversaries in the United States Court of Appeals for the Second Circuit included similar insulting declarations:

> "*Weinstock's inventing of this slur is consistent with the repeated abuse he hurls at the judiciary, and the singularly coercive tactics [that] he calls advocacy. See Weinstock v. Weinstock*, 167 A.D.2d 394, 396-97 (2nd Dep't 1990). The appeal is thus beyond frivolous. *With due respect the Court is compelled to impose sanctions against Weinstock that are sufficiently severe to give him the incentive to comport himself in accordance with the standards of our profession.*" (emphasis added)

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16. Counsel drafting the above-quoted slander was subsequently arrested by the New York City Police and indicted by a New York County grand jury for hiring a thug to physically attack movant in connection with the same litigation; he has since been suspended from the practice of law.

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E. *The Courts Have Inherent Power to Remedy Fraud*

45. In this serious context, and with direct and striking relevance to the above-related catalogue of both the Fischer attorneys' and Alter & Alter P.C.'s depredations on the Judicial System of this State, this Court, in *Matter of Raquel Marie X.*, 76 N.Y.2d 387, 559 N.Y.S.2d 855 (1990) clearly and unequivocally stated: "Fraud on the Court is intolerable *in any proceeding*" (emphasis added).

46. *Accord*: *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 419 N.Y.S.2d 908, 393 N.E.2d 982 (1979); *see also McMahon v. City of New York*, 105 A.D.2d 101, 483 N.Y.S. 228 (1st Dept. 1984) ("The inherent power of the Court to correct a judgment obtained by fraud is *not limited to a one-year time period*"); *Stephen-Leedom Carpet Co., Inc. v. Arkwright-Boston Mfrs. Mutual Insurance Co.*, 101 A.D.2d 574, 476 N.Y.S.2d 135 (1st Dept. 1984) ("*The proof that the Defendants falsified the evidence in this case affords the presumption that all of their evidence is false*"); *Hannon v. Dunkirk Motor Inn, Inc.*, 167 A.D.2d 834, 562 N.Y.S.2d 248 (4th Dept. 1990) (withholding devastating impeachment evidence a fraud on the court); *National Management Corporation v. Shelton Towers Associates*, 111 A.D.2d 154, 488 N.Y.S.2d 786 (2d Dept. 1985) (setting aside judgment due to "egregious" inconsistency between a witness's deposition testimony in another case and his testimony in the case on appeal).

47. In the leading case of *Guardian Life Ins. Co. of America v. Handel*, 190 A.D.2d 57, 596 N.Y.S.2d 804, (1st Dept. 1993), the Court highlighted the particularly egregious nature of fraud directly aided and abetted by counsel:

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> "It is well settled that when there is a duty to speak, silence may very well constitute fraudulent concealment [citation omitted] which is itself the equivalent of affirmative misrepresentations of fact [citation omitted]. This is especially true where an officer of the court owes such an obligation to the tribunal (Code of Professional Responsibility, DR 7-102[A][3] [22 NYCRR 1200.33(a)(3)]. Since Judiciary Law § 487 (1) interdicts misconduct by an attorney involving "deceit . . . with intent to deceive the court or any party", the correlative causes of action grounded upon that statute raise triable issues as well [citation omitted]"

48. Similar results obtain in the Federal Courts. In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), the Supreme Court underlined the judiciary's role in preserving the integrity of the very institutions attacked by both HH&F and Alter & Alter:

> "Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States v. Throckmorton*, 98 U.S. 61. But *where the occasion has demanded, where enforcement of the judgment is manifestly unconscionable, Pickford v. Talbott*, 225 U.S. 651, 657, 32 S.Ct. 687, 689, *they have wielded the power without hesitation.*

* * * * *

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find *a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.*
>
> * * * * *
>
> Furthermore, *tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society*. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. *The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud*".

49. *See also Chambers v. NASCO*, 501 U.S. 32 (1991) ("[T]he inherent power also allows the federal court to vacate its own judgment upon proof that a fraud has been perpetuated on the Court"); *Universal Oil Products Co. v. Root Refining Co.* 328 U.S. 575 ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud is without question"); *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra.*

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CONCLUSION

50. As was pointed out to the I.A.S. Court and the Appellate Division, this entire case has been predicated upon a massive hoax, and radical "U-Turn" perpetrated by respondent and her attorneys upon the Appellate Division, the I.A.S. Court and the First Department Grievance Committee. Playing "fast and loose" with all of these institutions, they first fraudulently claimed "lack of financial disclosure" so as to commence truly meaningless discovery — thus generating hundreds of thousands of dollars in fees — in the process burdening the Courts below with frivolous litigation. These attorneys tore movant's family apart, permanently alienating from him the affections of his elder son, Bernard, as well as tarring his name before all of the Courts of this State, directly impacting his ability to practice his chosen profession.

51. The Appellate Division's imposition of $10,000.00 in sanctions on Movant was the crowning miscarriage of justice in a fifteen-year-long, judicially sanctioned disaster. It exonerated a party carrying off a wholesale fraud on the Appellate Division, and imposed a wholly unequal and arbitrary penalty on a party whose only aim was to restore the formerly untarnished reputation surrounding his chosen profession of the practice of law.

WHEREFORE, Movant and former Plaintiff-Appellant herein respectfully prays (i) that this Motion pursuant to Rule 500.11 of this Court for leave to appeal from the Appellate Division's said Decision and Order dated September 28, 1998 be granted in all respects; and (ii) that the Court grant such other and further relief as is necessary and proper herein.

Belle Harbor, New York

APPENDIX G — SUMMARY OF CONTRADICTIONS

The following outline delineates many significant elements of the gross fraud perpetrated by Stanley Alter, Stephanie Alter and the law firm Alter & Alter (Hereinafter collectively referred to as "Alter") upon the courts and upon the parties involved in the actions cited below. This synopsis is divided into four sections; **I. SUMMARY OF CONTRADICTIONS, II. ALTER'S FLAGRANT DISCREPANCIES IN THE VERSIONS OF THE "FACTS", III. BLATANT FABRICATIONS** and **IV. ALTER'S DECEPTIVE PRACTICES IN GENERAL.** Whereas the purpose of this outline is to capsulize the Alter fraud into a manageable form, the items listed below represent some, but not all, of the instances in which Alter employed corrupt means to further his gain.

I. SUMMARY OF CONTRADICTIONS

Alter's Versions at the Facts (Stated Under Oath)

Wife never wanted to end the marriage. But Husband badgered Wife for many months to sign the Separation Agreement against her will. Finally, Wife agreed to sign a "symbolic" agreement as a "test" of her love and devotion. She was so unhinged by drugs as to not know even what she was signing. She received no advice and recommendations from her first attorney; Husband did not pay even a single penny toward Wife's support and maintenance; and she was never separated. Wife had no idea of Husband's assets or income, having only worked as an unpaid clerical worker for Husband. She had no knowledge that Husband had any interest in real

estate. Husband refused every demand made by Wife's attorney, leaving Wife with an agreement giving her nothing. She had no memory of anything that happened those weeks. (Alter inverted these "facts" during the equitable distribution trial and portrayed Wife as Husband's active partner in his career and business affairs.)

Wife's Versions of the Facts (Stated Under Oath)

Wife wanted to end her marriage. Husband did not. In December 1982 Wife went apartment hunting and insisted upon a divorce on her own terms. During the next few weeks, Wife engaged in her normal activities, did her shopping, and even interviewed for, and secured a supervisory job. Husband drew up a Separation Agreement, reflecting Wife's stated demands, and Wife took the document to an experienced matrimonial lawyer of her choice, but rejected his advice and recommendations. (In a complaint to the Disciplinary Committee against Husband, Wife suddenly claimed that she had been *defrauded* into signing the Separation Agreement, stating that the Husband urged that such and agreement was merely a "symbol of love" — conforming to Alter's language.) Nonetheless Husband acceded to 12 of the 13 demands made by her attorney. Wife worked for Husband as his bookkeeper and knew of all of Husband's assets and income, and knew of all of his real estate ventures. She had never been under psychiatric care (only marital counseling) and understood fully the terms

of the Separation Agreement. Husband had paid various living expenses (housing, utilities, telephone, insurance, automotive) pursuant to the Separation Agreement. After signing the Separation Agreement, Wife announced that she was separated and then sought to meet men.

II. ALTER'S FLAGRANT DISCREPANCIES IN THE VERSIONS OF THE FACTS

The numerical divisions below represent major issues involved in the action *Weinstock v. Weinstock*. The items listed in column form depict various accounts of the "facts" addressing versions prepared by Alter. The right hand column lists the versions of Alter's client (Wife) which totally contradict Alter's stories. The alphabetical sub-divisions within the left hand column define those instances where *Alter not only contradicts the sworn oral testimony of his client. but presents new and unique renditions of the "facts" which are completely inconsistent with sworn testimony in affidavits and pleadings that Alter prepared himself.*

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1. Did the Wife Ever Want a Separation?

ALTER'S VERSION: "NO"	**WIFE'S VERSION: "YES"**
ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a) Wife never wanted to leave the marriage or the marital home (EW Aff. 6/10/85 p. 3)	Wife told Dr. Gross that she *insisted* upon a separation. (E/B/T 11/29/85 pp. 110-111)
	Wife went looking for an apartment when she wanted to end the marriage.

* * *

(a) Husband and Wife had marital relations in the second home on a number of occasions. (EW Aff. 4/17/85 p. 3) (Alter himself states on the record in E/B/T 1/20/86 p. 43)

Since signing the Separation Agreement, Wife was inside the second home once. (E/B/T 1/20/86 p. 51)

WIFE CHANGES VERSION TO: "AT LEAST A DOZEN TIMES"

Wife had been inside the second home at least a dozen times. (E/B/T 1/20/86 p. 82)

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13. Did Husband Pay For Wife's Living Expenses After the Execution of the Separation Agreement?

	ALTER'S VERSION: "NO"	**WIFE'S VERSION: "YES"**
	SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a)	Wife did not receive one cent for her support and maintenance from her Husband. (EW Aff. 3/28/89 p. 5)	Wife's housing, mortgage, utilities, telephone, insurance and auto, etc. were paid for by Husband. (E/B/T 1/20/86 p. 167) (T/T 2/6/89 pp. 2040-2053)
		Husband has been paying $2,100.00 per month under the pendente lite award. (EW Aff. 1/6/95 Motion to Reargue)

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ALTER'S CONTRADICTORY VERSION: "YES"

(b) Husband has been paying Wife around $3,500.00 a month for maintenance since 1983. (ED Post Trial Memo p. 55)

14. Did Wife Have Any Knowledge of Husband's Income and Assets?

ALTER'S VERSION: "NO"	**WIFE'S VERSION: "YES"**
SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a) Wife had no idea of Husband's assets nor was she ever informed of Husband's assets. (EW Aff. 4/17/85 p. 3)	Wife knew Husband's approximate income and value of assets; naming each asset including real estate holdings. (E/B/T 11/29/85 pp. 63-70) (E/B/T 1/29/86 pp. 22-24)

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(b) Wife *believes* that Husband *may* have numerous business interests, including real estate, other than his law practice. (EW Aff. 8/16/85 p. 6)	
(c) The *only* document Wife has ever seen regarding Husband's income is a tax form mailed to her home *after* the lawsuit began. (EW App. Brief p. 15)	Wife admits to working on all Husband's business ventures. She prepared summaries of income and assisted in preparing financial statements for Husband. (E/B/T 1/20/86 pp. 9, 18) Wife knew of Husband's investments. (E/B/T 11/29/85 pp. 63-73) (E/B/T 1/20/86 pp. 24-36) Wife had discussions with Husband regarding the valuation of assets. (E/B/T 11/29/85 pp. 69-72)

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ALTER'S CONTRADICTORY VERSION: "YES"

(b) Wife had copies of joint tax returns for the years 1982 and 1983 in her possession; they were intended for her attorney; When Husband left the house, they were gone. (EW Aff. 5/28/85 p. 3)

15. Did Husband Steal Tax Returns For the Years 1982 or 1983? (Alleged when Wife attempted to obtain exclusive possession of the marital home in 1985)

ALTER'S VERSION: "YES"	**WIFE'S VERSION: "NO"**
SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a) Wife had copies of joint tax returns for the years 1982 and 1983 in her possession at one time. and when Husband left the house, they were gone. (EW Aff. 5/28/85 p. 3)	Wife never saw copies of the 1982 and 1983 tax returns. (E/B/T 11/29/85 p. 64) (E/B/T 1/29/86 p. 35)

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16. In What Capacity Did Wife Work For or With Husband?

	ALTER'S VERSION: "UNPAID CLERICAL WORKER"	**WIFE'S VERSION: "BOOKKEEPER"**
	SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a)	Wife was never Husband's bookkeeper, but rather an unpaid clerical worker. (EW Aff. 3/28/89 p. 5)	Wife describes herself as Husband's bookkeeper. (E/B/T 11/29/85 pp. 63, 76) (T/T 9/16/88 p. 6)
		Wife admits to working on all Husband's business ventures. She prepared summaries of income and assisted in preparing financial statements for Husband. (E/B/T 1/29/86 p. 9)

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ALTER'S CONTRADICTORY VERSION: "BOOKKEEPER"

(b) In equitable distribution trial, referring to Masada Construction Corp., "I worked on the books of Masada Construction Corp."
(EW Aff. 1/6/95 p. 3)

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17. Did Wife's First Attorney, Kurtz, Give Her Legal Advice?

	ALTER'S VERSION "NO"	**WIFE'S VERSION: "YES"**
	SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a)	Wife received *no* advice and recommendations from her first attorney. (EW Aff. 5/22/85 p. 3)	Wife *rejected* her first attorney's advice and recommendations. (E/B/T 11/29/85 p. 104) (E/B/T 1/20/86 p. 79) (The release of her first attorney states, ". . . I have rejected counsel's advice and legal representations regarding its overall nature.")

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18. Did Husband Ever Influence Wife With Regard to Her Employment or Lack Thereof?

ALTER'S VERSION: "DON'T WORK"	**WIFE'S VERSION: "WORK"**
SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a) Husband harassed Wife into leaving job. (Wife's Reply Brief p. 30)	Husband harassed Wife to get a job. (E/B/T 11/29/85 p. 81)
ALTER CHANGES VERSION TO: "WORK"	
(b) Husband harassed Wife to "get off your ass and get to work." (EW Counter-claim p. 8)	

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19. Did Husband Comply With the Terms of the Separation Agreement?

	ALTER'S VERSION: "NO"	**WIFE'S VERSION: "YES"**
	SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITIONS OR TRIAL
(a)	Husband failed to comply with his obligations under the Separation Agreement. (EW App. Brief p. 17) Wife did not receive "one cent for her support and maintenance from her husband." (EW Aff. 3/28/89 p. 5)	Wife's housing, mortgage, utilities, telephone, insurance, auto, etc., were paid for by Husband. (E/B/T 1/20/86 p. 167) (T/T 2/6/89 pp. 2040-2053) (All of children's expenses were paid by Husband including medical school and dormitory for each child. At the age of 15, the youngest child went to live with Husband.)

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ALTER CHANGES
VERSION TO: "YES"

(b) Wife requested that Court order Husband to *continue* paying for her maintenance.
(EW Aff. 3/28/89 p. 7)
(The Court ultimately refused this request since Husband had been making all payments; Alter renewed this extraneous request in '990 — please see section IV infra.)

Husband has been paying Wife around $3,500 a month for maintenance since 1983.
(ED Post Trial Memo p. 5)

(c) Wife has been receiving $2,100 a month.
(EW Aff. 1/6/95 p. 6)

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20. How Much Money, If Any, Did Wife Expend to Alter for Legal Fees as of March 1989?

	ALTER'S VERSION: ALMOST NOTHING	**WIFE'S VERSION: $25,800.00**
	SWORN ALLEGATIONS IN AFFIDAVITS AND PLEADINGS PREPARED BY ALTER	ADMISSIONS EXTRACTED FROM WIFE AT DEPOSITION OR TRIAL
(a)	Alter has labored for more than four years *without compensation* except for occasional, sporadic and minuscule amounts. (Alter Aff. 3/28/89 p. 3)	Wife had paid Alter $25,800 on account. (T/T 12/1/88 p. 1241) (Notwithstanding the foregoing, Wife swore in her affidavit dated 3/28/89, that "My attorneys have labored in my behalf for more than four years without payment, except for occasional, sporadic minuscule amounts which I had to borrow to pay them.") (EW Aff. 3/28/89 p.8)

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21. How Much Money, If Any, Did Wife Expend to Alter for Legal Fees as of January 1995?

ALTER'S VERSION: BARELY ANYTHING	**COURT'S VERSION: ALMOST $100,000.00**
(a) Alter has successfully represented Wife for almost ten years "*without any significant payment*" (emphasis added) (EW Aff. 1/6/95 p. 12)	The Court found that Alter had *already* received close to $100,000.00 (in addition to keeping $4,000.00 allocated for appraisal and accounting fees and other money given to Wife for her support and support of the children)